

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

PEDRO GOMEZ, ) No. C 08-2969 MMC (PR)  
Plaintiff, )  
v. ) **ORDER GRANTING SUMMARY  
JUDGMENT ON DELIBERATE  
INDIFFERENCE CLAIMS; DISMISSING  
SUPPLEMENTAL STATE LAW  
MEDICAL CLAIMS; GRANTING IN  
PART SUMMARY JUDGMENT ON  
EXCESSIVE FORCE CLAIMS;  
REFERRING FOR SETTLEMENT  
PROCEEDINGS**  
MERLE SOGGE, et al., )  
Defendants. )

---

On June 16, 2008, plaintiff, a California prisoner incarcerated at Pelican Bay State Prison (“PBSP”) and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983, claiming deliberate indifference to his serious medical needs and unlawful use of excessive force. Thereafter, the Court referred the matter to Magistrate Judge Nandor Vadas for early settlement proceedings under the Northern District’s Pro Se Prisoner Mediation Program. The parties, however, were unable to reach a settlement agreement, and the Court directed defendants to file their dispositive motions.

Now before the Court are the motions for summary judgment filed on behalf of five separate groups of defendants. Plaintiff has opposed the motions and defendants have filed

1 replies.

## 2 DISCUSSION

### 3 I. Legal Standard

4 Summary judgment is proper where the pleadings, discovery, and affidavits show  
5 there is “no genuine issue as to any material fact and that the moving party is entitled to  
6 judgment as a matter of law.” See Fed. R. Civ. P. 56(c). Material facts are those that may  
7 affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
8 (1986). A dispute as to a material fact is genuine if the evidence is such that a reasonable  
9 jury could return a verdict for the nonmoving party. See id.

10 The court will grant summary judgment “against a party who fails to make a showing  
11 sufficient to establish the existence of an element essential to that party’s case, and on which  
12 that party will bear the burden of proof at trial[,] . . . since a complete failure of proof  
13 concerning an essential element of the nonmoving party’s case necessarily renders all other  
14 facts immaterial.” See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); see also  
15 Anderson v. Liberty Lobby, 477 U.S. at 248 (holding fact is material if it might affect  
16 outcome of suit under governing law; further holding dispute about material fact is genuine  
17 “if the evidence is such that a reasonable jury could return a verdict for the nonmoving  
18 party”). The moving party bears the initial burden of identifying those portions of the record  
19 that demonstrate the absence of a genuine issue of material fact. The burden then shifts to  
20 the nonmoving party to “go beyond the pleadings, and by his own affidavits, or by the  
21 ‘depositions, answers to interrogatories, or admissions on file,’ designate ‘specific facts  
22 showing that there is a genuine issue for trial.’” See Celotex, 477 U.S. at 324 (citing Fed. R.  
23 Civ. P. 56(e)).

24 For purposes of summary judgment, the court must view the evidence in the light most  
25 favorable to the nonmoving party; if the evidence produced by the moving party conflicts  
26 with evidence produced by the nonmoving party, the court must assume the truth of the  
27 evidence submitted by the nonmoving party. See Leslie v. Grupo ICA, 198 F.3d 1152, 1158  
28 (9th Cir. 1999). The court’s function on a summary judgment motion is not to make

1 credibility determinations or weigh conflicting evidence with respect to a disputed material  
2 fact. See T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir.  
3 1987).

4 II. Deliberate Indifference to Serious Medical Needs

5 In the first amended complaint ("FAC"), the operative pleading herein, plaintiff claims  
6 he received constitutionally inadequate medical care from May 17 through May 24, 2007, the  
7 period during which he underwent a liver biopsy at PBSP and thereafter suffered from  
8 complications related thereto.

9 Deliberate indifference to a prisoner's serious medical needs violates the Eighth  
10 Amendment's proscription against cruel and unusual punishment. See Estelle v. Gamble,  
11 429 U.S. 97, 104 (1976). A determination of "deliberate indifference" involves an  
12 examination of two elements: the seriousness of the prisoner's medical need and the nature of  
13 the defendant's response to that need. McGuckin v. Smith, 974 F.2d 1050, 1059 (9th Cir.  
14 1992), overruled on other grounds, WMX Technologies, Inc. v. Miller, 104 F.3d 1133, 1136  
15 (9th Cir. 1997) (en banc). A "serious" medical need exists if the failure to treat a prisoner's  
16 condition could result in further significant injury or the "unnecessary and wanton infliction  
17 of pain." Id. (citing Estelle v. Gamble, 429 U.S. at 104). A prison official is deliberately  
18 indifferent if he knows a prisoner faces a substantial risk of serious harm and disregards that  
19 risk by failing to take reasonable steps to abate it. Farmer v. Brennan, 511 U.S. 825, 837  
20 (1994). The prison official must not only "be aware of facts from which the inference could  
21 be drawn that a substantial risk of serious harm exists," but "must also draw the inference."  
22 Id. Consequently, in order for deliberate indifference to be established, there must exist both  
23 a purposeful act or failure to act on the part of the defendant and harm resulting therefrom.  
24 See McGuckin, 974 F.2d at 1060.

25 A claim of medical malpractice or negligence is insufficient to make out a violation of  
26 the Eighth Amendment. Id. at 1059. Nor does a difference of opinion between a prisoner-  
27 patient and prison medical authorities regarding proper treatment amount to deliberate  
28 indifference. Franklin v. Oregon, 662 F.2d 1337, 1344 (9th Cir. 1981). In particular, a

1 plaintiff's opinion that medical treatment was unduly delayed does not, without more, state a  
 2 claim of deliberate indifference. Shapely v. Nevada Bd. of State Prison Comm'rs, 766 F.2d  
 3 404, 407 (9th Cir. 1985). Rather, in order to prevail on a claim based on delayed treatment, a  
 4 plaintiff must show that the course of treatment the doctors chose was medically  
 5 unacceptable under the circumstances, such treatment was chosen in conscious disregard of  
 6 an excessive risk to the plaintiff's health, and the delay resulted in harm to the plaintiff. See  
 7 Jackson v. McIntosh, 90 F.3d 330, 332 (9th Cir. 1996).

8 The Court next considers the evidence presented by each group of defendants in  
 9 support of their respective motions for summary judgment concerning plaintiff's claims of  
 10 deliberate indifference to plaintiff's serious medical needs, and plaintiff's evidence in  
 11 opposition thereto.<sup>1</sup>

12       A.     Plaintiff's Claims

13           1. Dr. Sogge

14              a. Facts

15 Plaintiff claims defendant Merle Sogge, M.D. ("Dr. Sogge") acted with deliberate  
 16 indifference to plaintiff's serious medical needs in connection with a liver biopsy procedure  
 17 he performed on plaintiff. The evidence submitted by the parties in support of and  
 18 opposition to the motion for summary judgment shows the following:

19       In May 2007,<sup>2</sup> plaintiff, who was incarcerated at PBSP and had been diagnosed with  
 20 Hepatitis C, was scheduled to undergo a liver biopsy as a prerequisite to his being treated  
 21 with Interferon. Dr. Sogge, a medical doctor employed at PBSP, performed a percutaneous  
 22 liver biopsy on May 17. (Decl. David M. Freeto, M.D., ("Freeto Decl.") in Supp. Mot.  
 23 Summ. J. ¶ 8 & Decl. Michael Ubaldi in Supp. Mot. Summ. J. Ex. C (PBSP Medical  
 24 Records) ("Ex. C") AGO-PBSP-MED 050.) Prior to Dr. Sogge's performing the liver

---

25           <sup>1</sup>The facts in the following section are drawn from plaintiff's verified complaint,  
 26 including attached exhibits, and the parties' evidence submitted in support of and in  
 27 opposition to the motion for summary judgment. The facts are undisputed unless otherwise  
 noted.

28           <sup>2</sup>All further dates referenced herein are in 2007, unless otherwise noted.

1 biopsy, plaintiff was informed of the risks associated with the procedure and the possible  
2 complications involved. Plaintiff signed a “Consent for Surgical Operation,” authorizing Dr.  
3 Sogge to perform the liver biopsy. (Ex. C AGO-PBSP-MED 067.) Additionally, Dr. Sogge,  
4 prior to performing the biopsy, performed a pre-operative evaluation. Specifically, Dr.  
5 Sogge reviewed plaintiff’s lab reports to confirm that the coagulation studies were normal,  
6 confirmed in a meeting with plaintiff before the procedure that plaintiff had taken nothing by  
7 mouth after midnight the night before, and went over the biopsy procedure with plaintiff.  
8 (Freeto Decl. ¶ 9.)

9 Dr. Sogge performed the liver biopsy using a #16 gauge needle to extract a specimen  
10 of the liver. (Id. ¶ 10 & Ex. C AGO-PBSP-MED 050.) As set forth in the declaration of  
11 David M. Freeto, M.D., a specialist in gastroenterology who is familiar with the standard of  
12 care for treatment of patients with Hepatitis C and has reviewed plaintiff’s medical records  
13 herein, use of this size needle is standard for the procedure. (Freeto Decl. ¶ 10.) Dr. Sogge  
14 also performed the biopsy with percussion of the liver, which procedure likewise was within  
15 the standard of care required of doctors performing such a biopsy. (Id.)

16 At the start of the biopsy procedure, Dr. Sogge told plaintiff to take a few deep breaths  
17 and then exhale. (FAC ¶ 32.) Dr. Sogge then told plaintiff to take another deep breath, and  
18 when plaintiff started to inhale he felt an immediate sharp pain inside of his body, towards  
19 the center of his chest. (Id.) Plaintiff felt he couldn’t breathe normally. (Id.) Dr. Sogge told  
20 plaintiff that what plaintiff was experiencing was within normal expectations for the  
21 procedure, and instructed plaintiff that if after his release from the Correctional Treatment  
22 Clinic he continued to experience shortness of breath, chest and abdominal pain, or persistent  
23 bleeding from the puncture site to immediately let officers and medical staff know. (FAC ¶  
24 33.) The sole occasion on which Dr. Sogge saw plaintiff was the performance of the biopsy  
25 procedure. (Freeto Decl. ¶ 11.)

26 After the biopsy procedure, plaintiff was taken to another room to be monitored.  
27 (FAC ¶ 33.) He remained there for approximately two hours before being returned to his  
28 cell, at which point he was provided with discharge instructions that included signs and

symptoms to watch for. (Freeto Decl. ¶ 11 & Ex. C AGO-PBSP-MED 007, 033, 066.)

2 For a period of days following the liver biopsy, plaintiff complained of shortness of  
3 breath, abdominal pain, and nausea. Between May 18 and 23, he was seen a number of times  
4 by PBSP medical staff and evaluated for these symptoms. (Id. ¶ 12.) Dr. Sogge was never  
5 informed of any of the complaints made by plaintiff post-biopsy. (Id.) On May 23, plaintiff  
6 was evaluated by a physician at the prison infirmary and transferred to Sutter Coast Hospital  
7 (“SCH”) for abdominal imaging. (Id. ¶ 13.) At SCH, plaintiff was discovered to have an  
8 upper GI bleed; specifically, an upper GI endoscopy revealed hematobilia (blood coming  
9 from the biliary tract). (Id.) Plaintiff was transferred to the University of California Medical  
10 Center at San Francisco (“UCSF”), where he was found to have a severed hepatic artery and  
11 an arterial portal fistula. (Id.; FAC ¶ 128.)

12 According to Dr. Freeto, bleeding is an acknowledged risk for liver biopsy because,  
13 no matter how the biopsy is performed, it is impossible to direct the needle away from every  
14 small blood vessel in a highly vascular organ such as the liver; consequently, bleeding is not  
15 indicative of poor technique. (Freeto Decl. ¶ 14.) In Dr. Freeto’s opinion, Dr. Sogge’s  
16 performance of the liver biopsy, as well as his discharge instructions and post-operative care  
17 and treatment, were in conformity with the requisite standard of care. (Id.)

### b. Analysis

19 Plaintiff claims Dr. Sogge acted with deliberate indifference to plaintiff's serious  
20 medical needs by incorrectly advising plaintiff that the pain plaintiff felt during the procedure  
21 was normal, and failing to recognize that he had lacerated an artery in plaintiff's liver.  
22 Plaintiff has failed to present, however, any medical evidence to counter Dr. Sogge's  
23 evidence that Dr. Sogge's advice to plaintiff was reasonable and that the treatment Dr. Sogge  
24 provided was within the requisite standard of care. Specifically, the only evidence presented  
25 by plaintiff in opposition to Dr. Sogge's motion for summary judgment is plaintiff's  
26 declaration attesting to the same facts asserted in the FAC, i.e., that plaintiff felt pain during  
27 the procedure and Dr. Sogge told him such pain was normal. Plaintiff's conclusory  
28 assertions are insufficient to raise a triable issue with respect to plaintiff's claim that Dr.

1 Sogge, by performing the procedure as he did and telling plaintiff the pain he experienced  
2 during the procedure was within the parameters of what should be expected, knowingly  
3 disregarded a substantial risk of serious harm to plaintiff. Further, the evidence is undisputed  
4 that Dr. Sogge was never made aware of plaintiff's post-operative medical complaints;  
5 consequently, Dr. Sogge could not have acted with deliberate indifference to plaintiff's  
6 serious medical needs by failing to respond to such concerns.

7 Based on the above, the Court concludes there is no evidence from which a reasonable  
8 trier of fact could conclude Dr. Sogge acted with deliberate indifference to plaintiff's serious  
9 medical needs. Accordingly, summary judgment will be granted in favor of Dr. Sogge on  
10 plaintiff's Eighth Amendment claim.

11                   2. Nurse Waddell

12                   a. Facts

13 Plaintiff claims defendant Susan Waddell, R.N. ("Nurse Waddell") acted with  
14 deliberate indifference to plaintiff's serious medical needs in connection with the liver biopsy  
15 procedure. The evidence submitted by the parties in support of and opposition to the motion  
16 for summary judgment shows the following:

17                   Nurse Waddell was assigned to the liver-biopsy clinic at PBSP at the time of  
18 plaintiff's liver biopsy. (Decl. S. Waddell in Supp. PBSP Defs. Mot. Summ. J. ("Waddell  
19 Decl.") ¶ 3.) Before the biopsy, Nurse Waddell explained to plaintiff the risks associated  
20 with the biopsy procedure. (Id. ¶ 4.) Plaintiff, by signing the form consenting to the  
21 procedure, indicated that he understood the risks. (Id. & Decl. Trace Maiorino in Supp.  
22 PBSP Defs. Mot. Summ. J. Ex. A (PBSP Medical Records) ("Ex. A") at AGO 067.) Nurse  
23 Waddell was not present for the liver biopsy and did not observe it. (Waddell Decl. ¶ 4.)

24                   Following the procedure, Nurse Waddell monitored plaintiff in the clinic for  
25 approximately two hours before he was returned to his cell. (Id. ¶ 5.) During that time, she  
26 recorded plaintiff's vital signs on six separate occasions and noted plaintiff showed no signs  
27 or symptoms of complications related to the biopsy procedure. (Id.) Also during that time  
28 period, Nurse Waddell took plaintiff's temperature every fifteen minutes. (FAC ¶ 34.)

1 During “several of” the temperature checks, plaintiff told her he couldn’t breathe normally  
2 because he would get a pinching pain on the lower right side of his stomach and pain in his  
3 chest. (Id.) Nurse Waddell told plaintiff his symptoms were normal and that the pain would  
4 go away. (Id.) After two hours plaintiff was able to breathe a little better, although he was  
5 still in some pain, which Nurse Waddell again advised him was normal and would go away.  
6 (Id.)

7 Nurse Waddell determined plaintiff could be returned to his cell. (Waddell Decl. ¶ 5.)  
8 Before plaintiff was transferred, Nurse Waddell verbally provided him with post-operative  
9 instructions, telling him to contact clinic staff with any complaints listed on the post-  
10 operative instructions, as well as any other problems he might experience in the next few  
11 days. (Id.) Additionally, she told plaintiff to tell custody staff that he had undergone a liver  
12 biopsy and was instructed to request medical treatment if he had any problems. (Id.)  
13 Plaintiff confirmed that he understood the post-operative instructions and signed the form  
14 titled “Post-op Instructions for Percutaneous Liver Biopsy.” (Id. & Ex. A at AGO 066.) The  
15 form advised plaintiff to report to medical staff if he experienced shortness of breath,  
16 persistent bleeding from the puncture site, abdominal distress, fainting spells, or fever. (Id.)  
17 Nurse Waddell further advised plaintiff that some amount of soreness at the puncture site is  
18 common following a liver biopsy, but pain is not normal and that he needed to report any  
19 such pain he felt. (Waddell Decl. ¶ 5.) After May 17, Nurse Waddell had no further direct  
20 contact with plaintiff and no opportunity to provide him with medical treatment. (Id. ¶ 6.)

21 On May 22, plaintiff was seen at his cell by a nurse, for complaints of severe stomach  
22 and chest pains and trouble breathing. When plaintiff asked to see a doctor, the nurse told  
23 plaintiff that he had been placed on the doctor’s list for the following day, and that Nurse  
24 Waddell also had been notified of plaintiff’s complaints. (FAC ¶¶ 67-70.) The nurse  
25 contacted Nurse Waddell and told her that plaintiff had complained of “severe chest pain”  
26 and difficulty breathing, but that he did not appear to be in physical distress. (Waddell Decl.  
27 ¶ 7.) Nurse Waddell was further advised that plaintiff’s breathing, heart rate, and  
28 temperature were normal and that he was able to walk without any guarding of his chest area.

1 (Id.) Nurse Waddell informed the nurse that “chest pain” was not listed on the post-operative  
2 instructions as an indicator of complications from a liver biopsy. (Id.) Nurse Waddell does  
3 not supervise the nurse who contacted her, and the nurse does not report to Nurse Waddell as  
4 part of her job duties. (Id.) Nurse Waddell had no further contact with the nurse on May 22,  
5 and at no time on that date was Nurse Waddell responsible for providing medical treatment to  
6 plaintiff. (Id.)

### b. Analysis

8 Plaintiff claims Nurse Waddell acted with deliberate indifference to his serious  
9 medical needs because she did not adequately explain to plaintiff the risks associated with the  
10 biopsy procedure, she did not adequately monitor plaintiff after the procedure because she  
11 failed to realize plaintiff had suffered a medical complication during the procedure, and she  
12 failed to respond when she was alerted several days after the procedure that plaintiff was  
13 experiencing pain. The Court finds plaintiff has failed to raise a triable issue of fact with  
14 respect to deliberate indifference on the part of Nurse Waddell.

15        Specifically, even if, as plaintiff asserts, Nurse Waddell did not adequately explain to  
16 him the risks of the procedure before he signed the consent form, such failure would  
17 constitute no more than negligence and does not rise to the level of deliberate indifference.  
18 Further, the undisputed evidence shows Nurse Waddell regularly monitored plaintiff during  
19 the two hours he remained in the clinic after the procedure, and that she noted no symptoms  
20 of complications. Moreover, plaintiff has presented no evidence to dispute the declaration  
21 submitted by M. Sayre, M.D. (“Dr. Sayre”), the Chief Medical Officer for PBSP, who attests  
22 that plaintiff’s injury was not immediately detectible by medical staff following the liver  
23 biopsy, and that it took at least two days for his symptoms to progress to the point where  
24 emergent medical care was necessary. (See Decl. Dr. Sayre in Supp. PBSP Defs. Mot.  
25 Summ. J. (“Sayre Decl.”) ¶ 10.) Lastly, although plaintiff argues that Nurse Waddell’s  
26 position as the liver-biopsy nurse at PBSP required her to respond to him when, five days  
27 after plaintiff’s procedure, she learned from another nurse that plaintiff was experiencing  
28 pain, the undisputed facts show Nurse Waddell spoke with the nurse and advised her that

1 chest pain was not an indicator of complications from a liver biopsy; further, as set forth  
2 above, the undisputed evidence is that Nurse Waddell was not responsible for providing  
3 medical treatment to plaintiff on that date. (See Waddell Decl. ¶ 7.)

4 Based on the above, the Court concludes there is no evidence from which a reasonable  
5 trier of fact could determine Nurse Waddell acted with deliberate indifference to plaintiff's  
6 serious medical needs. Accordingly, summary judgment will be granted in favor of Nurse  
7 Waddell on plaintiff's Eighth Amendment claim.

8       3. Officer Cox

9           a. Facts

10 Plaintiff claims PBSP Correctional Officer Cox ("Officer Cox") acted with deliberate  
11 indifference to plaintiff's serious medical need on May 20. The evidence submitted by the  
12 parties in support of and opposition to the motion for summary judgment shows the  
13 following:

14       According to plaintiff, on May 20, during "second watch" he informed Officer Cox  
15 that he had recently had a liver biopsy and was having trouble breathing and was in severe  
16 pain. Plaintiff states Officer Cox brushed him aside and did nothing to obtain medical  
17 assistance for him, forcing plaintiff to spend the remainder of the day without medical care.  
18 (FAC ¶¶ 43-44.)

19       According to Officer Cox, on May 20, Officer Cox was on "first watch" and worked a  
20 floor shift from 6:00 a.m. to 2:00 p.m. in plaintiff's housing unit, the Segregated Housing  
21 Unit in Facility C. (Decl. Officer Cox in Supp. PBSP Defs. Mot. Summ. J. ("Cox Decl.") ¶  
22 3.) At no time during the time period alleged by plaintiff did plaintiff provide Officer Cox  
23 with a medical request form, as required by prison regulations, request that Officer Cox  
24 summon emergent medical care, or appear to be in need of emergent medical care. (Id.)  
25 Additionally, at no time during the time period alleged by plaintiff did Officer Cox refuse to  
26 permit plaintiff to receive medical care, ignore any request for medical care, or intentionally  
27 delay plaintiff's access to medical care. (Id.) Further, plaintiff's receipt of emergent medical  
28 care was not entirely dependent upon Officer Cox. (Id. ¶ 4.) Inmates housed in Facility C

1 have access to the control-booth officer via an audio system, and may communicate from the  
2 inside of their cells with the officer in the control booth at any time (*Id.*) Additionally, if  
3 plaintiff required medical treatment, he could have contacted the medical staff, because they  
4 were in plaintiff's housing unit distributing medication during Officer Cox's watch. (*Id.*)

b. Analysis

6 In deciding Officer Cox's motion for summary judgment, the Court must view the  
7 facts in the light most favorable to plaintiff, the non-moving party. Even when the facts are  
8 viewed in plaintiff's favor, however, they are insufficient to support a finding that Officer  
9 Cox's actions amounted to deliberate indifference to plaintiff's serious medical needs.  
10 Specifically, even if Officer Cox did not respond to plaintiff's request for immediate medical  
11 attention, Officer Cox has presented undisputed evidence showing that during Officer Cox's  
12 shift, plaintiff had access to medical care through the control-booth officer and, most  
13 importantly, directly through medical staff who were in plaintiff's unit.

14       Consequently, even accepting plaintiff's account of his verbal exchange with Officer  
15 Cox, plaintiff has failed to show he was without access to medical care absent Officer Cox's  
16 assistance, nor has plaintiff submitted any evidence to suggest Officer Cox had reason to  
17 believe plaintiff's receipt of medical care was dependent on Officer Cox. Consequently, the  
18 undisputed evidence shows Officer Cox did not consciously disregard a substantial risk of  
19 serious harm to plaintiff, in violation of the Eighth Amendment.

20 Accordingly, summary judgment will be granted in favor of Officer Cox on plaintiff's  
21 Eighth Amendment claim.

#### 4. Nurse Carr

a. Facts

24 Plaintiff claims he received constitutionally inadequate care at PBSP from Nurse Carr  
25 on May 21. The evidence submitted by the parties in support of and opposition to the motion  
26 for summary judgment shows the following:

27 On May 21, plaintiff continued to suffer problems breathing, and the pain in his  
28 stomach and chest escalated. He was taken on a stretcher to the medical clinic. (FAC ¶¶ 45-

1 57.) Plaintiff was seen there by Nurse Carr, who placed EKG cables on plaintiff to monitor  
2 his heart and took plaintiff's vital signs. (*Id.* ¶ 60.) Nurse Carr found the EKG results and  
3 plaintiff's vital signs to be normal. (Decl. J. Carr Supp. PBSP Defs. Mot. Summ. J. ("Carr  
4 Decl.") ¶ 4.) Nurse Carr noted that plaintiff was conversant during the examination and in no  
5 apparent physical distress, and that he was able to walk without any guarding of his chest  
6 area. (*Id.*) Plaintiff told Nurse Carr he had recently had a liver biopsy and had been having  
7 medical problems ever since, including severe pain in his chest and stomach, and trouble  
8 breathing. (FAC ¶ 61.)

9 Nurse Carr consulted with defendant C. Williams, M.D. ("Dr. Williams"), gave  
10 plaintiff a gastrointestinal "cocktail," and monitored plaintiff's symptoms. (FAC ¶ 60;  
11 Maiorino Decl. Ex. A AGO 202.) After monitoring plaintiff, Nurse Carr again consulted  
12 with Dr. Williams about plaintiff's symptoms. (FAC ¶ 62; Carr Decl. ¶ 4.) Dr. Williams  
13 prescribed Nexium, a gastrointestinal medication. (FAC ¶ 63; Carr Decl. ¶ 4.)

14 Based on Nurse Carr's medical evaluation of plaintiff and Nurse Carr's conversation  
15 with Dr. Williams, Nurse Carr did not believe plaintiff was suffering from physical  
16 complications from the liver biopsy, and there was no indication that plaintiff was suffering  
17 from infection or internal bleeding. (Carr Decl. ¶ 4.) Nurse Carr did, however, identify in  
18 Nurse Carr's medical examination notes that "the mechanism of injury" was "possibly  
19 related to liver biopsy." (Carr Decl. ¶ 4 & Ex. A AGO 201.) Nurse Carr instructed plaintiff  
20 to return to the medical clinic if his chest pain persisted or if he had profuse sweating, and  
21 scheduled plaintiff for a follow-up medical appointment on May 26. (Carr Decl. ¶ 4.) After  
22 the May 21 examination, Nurse Carr had no further contact with Plaintiff. (*Id.*)

23 b. Analysis

24 Plaintiff maintains the evidence shows Nurse Carr acted with deliberate indifference  
25 to plaintiff's serious medical needs by failing to properly treat plaintiff after diagnosing him  
26 as suffering from complications from the liver biopsy. The Court finds no evidence of  
27 deliberate indifference. To the contrary, the undisputed evidence shows Nurse Carr  
28 thoroughly examined plaintiff, twice consulted with Dr. Williams about plaintiff's condition,

1 advised plaintiff to return to the clinic if his symptoms persisted, and scheduled a follow-up  
2 appointment for him. Further, the evidence does not show Nurse Carr diagnosed plaintiff as  
3 having complications relating to his liver biopsy. Nurse Carr's medical notes show Nurse  
4 Carr considered such complication as one possible explanation for plaintiff's medical  
5 complaints. Rather than evidencing deliberate indifference to plaintiff's serious medical  
6 needs, such notation reflects Nurse Carr's attention to detail and attempt to provide plaintiff  
7 with appropriate medical treatment.

8 Based on the above, the Court concludes there is no evidence from which a reasonable  
9 trier of fact could conclude Nurse Carr acted with deliberate indifference to plaintiff's serious  
10 medical needs. Accordingly, summary judgment will be granted in favor of Nurse Carr on  
11 plaintiff's Eighth Amendment claim.

12 **5. Nurses Bree and Timme**

13 **a. Facts**

14 Plaintiff claims he received constitutionally inadequate medical care at PBSP from  
15 Lori Bree, R.N. ("Nurse Bree") and David Timme, R.N. ("Nurse Timme") on May 22 and 23.  
16 The evidence submitted by the parties in support of and opposition to the motion for  
17 summary judgment shows the following:

18 On May 22, plaintiff requested medical treatment and complained that he had severe  
19 chest and back pain and breathing difficulties, and that he could not sleep because of the pain  
20 and shortness of breath. (FAC ¶ 66; Maiorino Decl. Ex. A AGO 016-17.) Nurse Bree  
21 responded to the request by coming to plaintiff's cell. (*Id.*) She spoke to plaintiff and found  
22 him to be alert, oriented, and observed that he moved with a steady gait. (Decl. L. Bree in  
23 Supp. PBSP Defs. Mot. Summ. J. ("Bree Decl.") ¶ 4 & Ex. A AGO 017.) Plaintiff denied  
24 vomiting, nausea, cough, stomach cramps, leg cramps, or any abdominal discomfort. (*Id.*)  
25 Nurse Bree took plaintiff's vital signs and found them to be normal. (*Id.*) Nurse Bree was  
26 aware that plaintiff had undergone a liver biopsy on May 17 and had been seen by PBSP  
27 medical staff the day before. (*Id.*). She examined plaintiff and saw no medical indication  
28 that he was suffering from infection or internal bleeding, and examined the biopsy area and

1 saw no inflammation or any indications of infection. (Id.) Nurse Bree contacted the liver-  
2 biopsy nurse and told the nurse about plaintiff's complaints, Nurse Bree's observations, and  
3 plaintiff's vital signs. Nurse Bree scheduled plaintiff to see a doctor the next day. (Id.)

4       Later that same day, plaintiff again complained about his medical needs and was  
5       escorted to the medical clinic, where he was evaluated by Nurse Timme. (FAC ¶ 74; Decl.  
6       D. Timme in Supp. PBSP Defs. Mot. Summ. J. (“Timme Decl.”) ¶ 4.) Plaintiff wanted to go  
7       to the Correctional Treatment Clinic for an EKG. Nurse Timme took plaintiff’s vital signs  
8       and determined his breathing, heart rate and temperature were normal. (Timme Decl. ¶ 4.)  
9       Plaintiff did not appear to be in any physical distress, and was able to walk and talk without  
10       guarding of his chest area. (*Id.*) Nurse Timme determined there was no medical indication  
11       that plaintiff was suffering from cardiac-related problems, infection, or internal bleeding.  
12       (*Id.*) Nurse Timme was aware plaintiff had been medically evaluated on May 21 for the  
13       same complaints and had been provided medication, and that he was scheduled to see a  
14       doctor the next day. (*Id.*) Immediately after Nurse Timme told plaintiff he did not need an  
15       EKG and that he would be seen by a physician the next day, an emergency alarm was  
16       activated in another area of the prison and Nurse Timme was required to end the examination  
17       and respond to the emergency. (*Id.*)

18        The next morning, May 23, plaintiff again complained about his medical condition  
19 and continuing pain. He was seen by Nurse Bree. (FAC ¶ 92.) She took plaintiff's vital  
20 signs, which were within normal limits, and told him he would be seen by a doctor later that  
21 day. (Bree Decl. ¶ 5.)

b. Analysis

23 Plaintiff contends Nurses Bree and Timme acted with deliberate indifference to his  
24 serious medical needs by failing to properly respond to his requests for care. The undisputed  
25 evidence, however, shows Nurse Bree and Nurse Timme did not purposefully fail to respond  
26 to or ignore plaintiff's medical complaints. Although neither Nurse Bree nor Nurse Timme  
27 discovered that plaintiff had suffered a complication during the liver biopsy procedure, such  
28 evidence does not support an inference that they knew plaintiff faced a substantial risk of

1 serious harm and disregarded that risk by failing to take reasonable steps to abate it. Rather,  
2 the evidence shows Nurses Bree and Timme reasonably responded to plaintiff's medical  
3 complaints.

4 Based on the above, the Court concludes there is no evidence from which a reasonable  
5 trier of fact could conclude either Nurse Bree or Nurse Timme acted with deliberate  
6 indifference to plaintiff's serious medical needs. Accordingly, summary judgment will be  
7 granted in favor of Nurses Bree and Timme on plaintiff's Eighth Amendment claims.

8 **6. Drs. Rowe and Williams**

9 **a. Facts**

10 Plaintiff claims he received constitutionally inadequate medical care at PBSP from  
11 Linda Rowe, M.D. ("Dr. Rowe") and Dr. Williams on May 23. The evidence submitted by  
12 the parties in support of and opposition to the motion for summary judgment shows the  
13 following:

14 Plaintiff was seen in the PBSP medical clinic by Dr. Rowe on the afternoon of May  
15 23. (FAC ¶ 105.) Prior to this interaction with plaintiff, Dr. Rowe had no knowledge that  
16 plaintiff had requested medical treatment after his liver biopsy and had no opportunity to  
17 treat him. (Decl. L. Rowe, M.D., in Supp. PBSP Defs. Mot. Summ. J. ("Rowe Decl.") ¶ 6.)  
18 During the examination by Dr. Rowe, plaintiff complained of pains in his right upper-body  
19 quadrant, including the shoulder, chest and lung areas, and stated the pain "comes and goes."  
20 (Rowe Decl. ¶ 7.) He further complained of a decreased appetite and stated he felt some  
21 nausea but had not vomited. (Id.) He had no fever, but complained of sweating the night  
22 before the examination. (Id.) He complained that the gastrointestinal medicine he had been  
23 given did not relieve the pain. (Id.)

24 Dr. Rowe observed that plaintiff had some generalized tenderness in his upper and  
25 lower abdomen; she thought the abdominal pain might be related to the May 17 liver biopsy.  
26 (Id.) Believing that plaintiff required a higher level of medical care than the medical clinic  
27 could provide him, Dr. Rowe determined plaintiff needed to be transferred to PBSP's Urgent  
28 Treatment Area ("UTA") or, possibly, transported to an outside hospital. (Id.) Dr. Rowe

1 discussed plaintiff's medical condition with Dr. Williams in the UTA and, immediately  
2 thereafter, sent plaintiff to the UTA for further examination. (*Id.*; FAC ¶ 106.)

3 Once plaintiff arrived at the UTA, Dr. Williams concluded plaintiff required emergent  
4 care and transferred plaintiff to SCH for treatment. (Decl. C. Williams, M.D., in Supp. PBSP  
5 Defs. Mot. Summ. J. (“Williams Decl.”) ¶ 8.)

b. Analysis

7 Plaintiff claims Drs. Rowe and Williams acted with deliberate indifference to his  
8 serious medical needs by failing to provide him with adequate medical care. Plaintiff has  
9 presented no evidence, however, to support his assertions.

10 Plaintiff claims he should have been seen by Dr. Rowe before May 23; it is  
11 undisputed, however, that Dr. Rowe was not aware of plaintiff's need for medical attention  
12 prior to her examination of him on that date. Additionally, there is no evidence to support  
13 plaintiff's assertion that on May 23 Dr. Rowe should have seen plaintiff in the morning but  
14 delayed seeing him until the afternoon. Further, even if there was a delay, there is no  
15 evidence to support an inference that the cause of such delay was Dr. Rowe's deliberate  
16 indifference to plaintiff's serious medical needs rather than, for example, administrative  
17 reasons.

18       Similarly, plaintiff's assertion of constitutionally inadequate medical care by Dr.  
19 Williams is wholly unsupported by the record. The undisputed evidence shows that as soon  
20 as Dr. Williams saw plaintiff in the UTA, he concluded plaintiff required emergent care and  
21 transferred plaintiff to SCH for treatment.

22 Accordingly, based on the above, summary judgment will be granted in favor of Drs.  
23 Rowe and Williams on plaintiff's Eighth Amendment claims.

## 7. SCH Defendants

### a. Facts

26 Plaintiff claims that from May 23 through May 25 he received constitutionally  
27 inadequate medical care from SCH medical practitioners Andrean Gurov, M.D. (“Dr.  
28 Gurov”), Donald Micheletti, M.D. (“Dr. Micheletti”), Sylvia Nash, M.D. (“Dr. Nash”),

1 Sandra Saunders, M.D. (“Dr. Saunders”), Susan Schommer, M.D. (“Dr. Schommer”), and  
2 Physician’s Assistant Gina Gastelum (“P.A. Gastelum”). The evidence submitted by the  
3 parties in support of and opposition to the motion for summary judgment shows the  
4 following:

5 Plaintiff arrived at the SCH Emergency Department (“ED”) at approximately 4:00  
6 p.m. on May 23. (Decl. Aaron T. Schultz, Esq., in Supp. Gastelum/Nash/Saunders Mot.  
7 Summ. J. (“Schultz Decl.”) Ex. B (SCH Medical Records) at 23.) Upon arrival in the ED,  
8 plaintiff was triaged as a Level 3 and kept on a gurney until an examination room was  
9 available. (Id. at 29, 31, 32.) At approximately 4:45 p.m., plaintiff was examined by P.A.  
10 Gastelum, who first encountered plaintiff while plaintiff was in the examination room.  
11 (Decl. G. Gastelum in Supp. Gastelum/Nash/Saunders Mot. Summ. J. (“Gastelum Decl.”) ¶  
12 4.) Gastelum performed a physical examination of plaintiff and took his medical history.  
13 (Id. & Ex. B at 26-27.) After she examined plaintiff, P.A. Gastelum determined plaintiff  
14 needed to be seen by her supervising physician, Dr. Saunders. (Id.)

15 P.A. Gastelum brought plaintiff to the attention of Dr. Saunders, who performed a  
16 physical examination of plaintiff and determined plaintiff needed a CT scan in order for his  
17 abdominal complaints to be evaluated. (Gastelum Decl. ¶ 4; Decl. S. Saunders, M.D., in  
18 Supp. Gastelum/Nash/Saunders Mot. Summ. J. (“Saunders Decl.”) ¶ 4); Ex. B at 26-27, 31.)  
19 While plaintiff was having his CT scan, Dr. Saunders’s shift ended. Dr. Saunders had no  
20 further contact with plaintiff. (Saunders Decl. ¶ 4.)

21 Upon plaintiff’s return to the ED following the CT scan, it was noted that plaintiff’s  
22 pain was worsening and that he had vomited approximately 250 ml of blood. Plaintiff was  
23 then given pain medication. (Gastelum Decl. ¶ 5 & Ex. B at 26-27, 31.)

24 Following the CT scan, another physician, Dr. Nash, took over as the supervising ED  
25 physician. (Gastelum Decl. ¶ 6 & Exhibit B at 24 - 25.) Dr. Nash performed a physical  
26 examination of plaintiff and reviewed his medical history and tests. (Decl. S. Nash, M.D., in  
27 Supp. Gastelum/Nash/Saunders Mot. Summ. J. (“Nash Decl.”) ¶ 4.) The CT scan showed  
28 plaintiff had high density material in his gallbladder consistent with hemorrhage in the biliary

1 system. (Id.) From her examination and results of the CT scan, Dr. Nash determined  
2 plaintiff needed to be admitted to the hospital because of complications following a liver  
3 biopsy. (Id.) Dr. Nash contacted Dr. Schommer, the surgeon on call, to consult on plaintiff's  
4 condition. (Id.) Dr. Schommer agreed to see plaintiff for surgical consultation and to  
5 perform an EGD (esophagogastroduodenoscopy), but requested plaintiff be admitted to the  
6 Internal Medicine department in light of the medical care required for treating a patient with  
7 hepatitis. (Decl. Jeff Schwartz, M.D., in Supp. Schommer Mot. Summ. J. ("Schwartz Decl.")  
8 ¶ 6(c).)

9 Following Dr. Schommer's request, Dr. Nash contacted Dr. Andrean Gurov, who  
10 agreed to be the admitting physician for plaintiff. (Decl. Matthew J. Miller, M.D., in Supp.  
11 Gurov/Micheletti Mot. Summ. J. ("Miller Decl.") ¶ 10.) At approximately 9:30 p.m. on May  
12 23, Dr. Gurov completed a medical history and physical examination of plaintiff. (Id. ¶ 11.)  
13 Dr. Gurov reviewed laboratory data obtained in the ED and plaintiff's CT scan, and assessed  
14 plaintiff as having an upper GI bleed. (Id. ¶¶ 12-13.) Dr. Gurov ordered IV fluids, a proton  
15 pump inhibitor to reduce gastric acid, and Zosyn, an antibiotic, to cover cholecystitis  
16 (inflammation of the gall bladder). In Dr. Gurov's assessment, plaintiff was not septic and  
17 was stable, being minimally symptomatic. (Id.)

18 Dr. Gurov called Dr. Schommer, who was scheduled to perform an EGD the next day.  
19 Dr. Gurov planned to admit plaintiff to telemetry for monitoring, and to have plaintiff's  
20 complete blood count ("CBC") monitored every four to six hours. (Id. ¶ 14.) Dr. Gurov  
21 noted that a blood transfusion would be considered if necessary, and plaintiff was typed and  
22 screened for compatible blood products. (Id.) Dr. Gurov also noted that plaintiff's  
23 electrolytes would be followed. (Id.) Plaintiff was admitted to the Intensive Care Unit  
24 ("ICU") at approximately midnight and was continued on medications for nausea, vomiting  
25 and pain. His vital signs all remained stable. (Id. ¶ 16.)

26 The next day, May 24, at 1:00 p.m., Dr. Schommer consulted with plaintiff. After  
27 examining plaintiff and reviewing his medical records, lab results and CT scan, it was Dr.  
28 Schommer's impression that plaintiff had an intrahepatic bleed secondary to the liver biopsy.

1 (Schwartz Decl. ¶ 6(e).) Her plan was to perform an EGD to find the source of the bleeding.  
2 Dr. Schommer explained the risks and benefits of the procedure and that intravenous sedation  
3 was going to be used. Plaintiff consented to the procedure and, that same date, Dr.  
4 Schommer performed a video EGD. The procedure was completed without complication and  
5 plaintiff was transferred to the intensive care unit in stable condition. (Id. ¶ 6(f)-(g).)

6 After completing the procedure, Dr. Schommer discussed the results of the EGD with  
7 Dr. Gurov. Dr. Schommer's impression was that the bleeding appeared to be coming from  
8 the biliary ducts and/or gallbladder and that plaintiff potentially could develop cholangitis (an  
9 infection of the bile duct) due to clotting. Dr. Schommer recommended plaintiff be  
10 maintained on IV anticoagulants, antibiotics and protonics, that he remain hospitalized, and  
11 that his vital signs and lab results be monitored. Dr. Schommer ordered follow-up blood  
12 work and indicated she would follow plaintiff with Dr. Gurov. (Id. ¶ 6(h); Miller Decl. ¶ 20.)

13 Dr. Gurov saw plaintiff that same date at approximately 4:00 p.m. Dr. Gurov's  
14 progress note indicates plaintiff felt well and his vital signs were stable. Dr. Gurov had read  
15 Dr. Schommer's report recommending plaintiff be kept for observation for possible bile duct  
16 obstruction or cholangitis, and felt plaintiff could be transferred to the medical surgery unit.  
17 (Miller Decl. ¶ 21.)

18 Dr. Schommer saw plaintiff the following day, May 25, at 8:45 a.m., after receiving a  
19 call from the nurses, who indicated plaintiff complained of dizziness, nausea and increased  
20 right upper quadrant pain. (Schwartz Decl. ¶ 6(i).) After physically examining plaintiff and  
21 reviewing his CBC, it was Dr. Schommer's impression that plaintiff had new onset  
22 leukocytosis (an elevated white blood cell count) and urinary retention. She recommended  
23 transferring plaintiff to a higher level of care, as she believed he would need consultation  
24 with a gastroenterologist and quite possibly a biliary surgeon. (Id.)

25 That same date, Dr. Micheletti arranged for plaintiff's transfer to the care of Dr.  
26 Hobart Harris at UCSF. Dr. Micheletti completed a discharge summary at approximately  
27 1:40 p.m., which included an assessment of the treatment plaintiff had received at SCH and  
28 plaintiff's most recent lab results. Based on such assessment, Dr. Micheletti determined a

1 blood transfusion was not necessary, that plaintiff was in no acute distress, and that he was  
2 stable for transfer. (Miller Decl. ¶ 24.) While waiting to be transferred, plaintiff continued  
3 to receive IV morphine for pain, pursuant to Dr. Micheletti's orders. (*Id.* ¶ 25.)

4 At approximately 4:20 p.m., UCSF notified the discharge planner that UCSF had a  
5 bed for plaintiff and wanted him to arrive after 7:00 p.m. At 7:45 p.m. plaintiff was  
6 discharged from SCH to the transport team for transfer to UCSF by air ambulance. No acute  
7 changes were reported. (Id. ¶ 26.) Plaintiff was admitted to UCSF that night. The following  
8 day, May 26, plaintiff required a blood transfusion and another abdominal CT scan was  
9 performed. Based on the information from that CT scan, a hepatic arteriogram was  
10 performed. A lacerated right hepatic artery branch vessel and an arteriportal fistula (a  
11 connective growth between the hepatic artery and the portal vein) were identified. Surgery  
12 was successfully performed, after which plaintiff's abdominal pain resolved. The UCSF  
13 discharge summary states plaintiff was in very good condition two days after the surgical  
14 procedure. On May 28, he was transferred back to PBSP. (Id. ¶ 28.)

### b. Analysis

16 Plaintiff claims all of the above SCH medical practitioners failed to provide him with  
17 constitutionally adequate medical care. Plaintiff, however, has failed to present evidence  
18 sufficient to raise a triable issue on an essential element of plaintiff's claim, specifically, that  
19 any of said defendants acted with deliberate indifference to plaintiff's serious medical needs.

i. Dr. Nash, Dr. Saunders, and P.A. Gastelum

21 Plaintiff claims Drs. Nash and Saunders and P.A. Gastelum failed to promptly provide  
22 him with pain medication and other care upon his arrival at the ED at SCH.

23 In moving for summary judgment, said defendants first argue they are not subject to  
24 suit under 42 U.S.C. § 1983 because they are not state actors. An essential element of an  
25 action brought under § 1983 is that the defendant accused of violating the plaintiff's  
26 constitutional rights acted under color of state law. See Gomez v. Toledo, 446 U.S. 635, 640  
27 (1980). Action taken by private individuals or organizations may be under color of state law  
28 "if, though only if, there is such a close nexus between the State and the challenged action

1 that seemingly private behavior may be fairly treated as that of the State itself.” Brentwood  
2 Academy v. Tennessee Secondary Sch. Athletic Ass’n, 531 U.S. 288, 295-96 (2001) (internal  
3 quotation and citation omitted).

4 In support of their motion for summary judgment, defendants present evidence that  
5 they were not employed by the state of California, specifically, evidence showing Drs. Nash  
6 and Saunders both were independent contractors working for SCH, a private hospital, and  
7 had not contracted with the state, and evidence showing P.A. Gastelum was employed by  
8 SCH. (Decl. Nash ¶ 3; Decl. Saunders ¶ 3; Decl. Gastelum ¶ 3.) Further, said defendants  
9 argue, they were not otherwise involved in state activity under any of the traditional tests  
10 applied by the federal courts for deciding whether a private person or entity qualifies as a  
11 state actor. See Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 939 (1982) (identifying  
12 public function, state compulsion, nexus and joint-action tests). Plaintiff offers no evidence  
13 or legal argument in opposition. Based on defendants’ undisputed showing, the Court finds  
14 Drs. Nash and Saunders and P.A. Gastelum are not state actors for purposes of § 1983.

15 The Court further finds that even assuming said defendants may be deemed state  
16 actors, plaintiff has presented no evidence that raises a triable issue as to his claim that said  
17 defendants acted with deliberate indifference to his serious medical needs while he was in the  
18 ED at SCH. Specifically, the evidence shows said defendants undertook to care for and treat  
19 plaintiff by examining him, providing him with pain medication, and obtaining consultations  
20 and tests that led to his eventual diagnosis and transfer to UCSF. There is no evidence to  
21 suggest any of said defendants at any time knowingly disregarded a substantial risk of serious  
22 harm to plaintiff. Indeed, the only evidence in that regard is the declaration of Elliot S.  
23 Nipomnick, M.D. (“Dr. Nipomnick”), a physician specializing in emergency medical care; in  
24 Dr. Nipomnick’s expert opinion, all of the care provided by the above three individuals was  
25 appropriate and within the standard of care. (See Declaration of Elliot S. Nipomnick, M.D. ¶  
26 11.)

27 Accordingly, summary judgment will be granted in favor of Drs. Nash and Saunders  
28 and P.A. Gastelum on plaintiff’s Eighth Amendment claims.

ii. Dr. Schommer

2 Plaintiff claims Dr. Schommer acted with deliberate indifference to his serious  
3 medical needs by failing to properly diagnose the source of his pain or send him more  
4 promptly for a higher level of medical care. The record does not support plaintiff's  
5 assertions. Rather, the record shows Dr. Schommer reasonably responded to plaintiff's  
6 medical needs, as evidenced by the following undisputed facts: Upon meeting with plaintiff  
7 for the first time on the morning of May 24, Dr. Schommer examined plaintiff and reviewed  
8 a CT scan, which illustrated blood in the gall bladder and hemobilia; that same date Dr.  
9 Schommer performed a video EGD to find the source of the bleeding; immediately following  
10 the EGD, Dr. Schommer diagnosed bleeding from the biliary duct and/or liver, and  
11 determined that plaintiff should remain in the hospital and be monitored to further determine  
12 the source of the bleeding; on May 25, after plaintiff complained of increased pain and had  
13 an elevated white blood count, Dr. Schommer immediately recommended plaintiff be  
14 transferred to a facility with a higher level of care in order that he could be evaluated by a  
15 gastroenterologist and a biliary surgeon.

16 Other than plaintiff's declaration asserting Dr. Schommer's care was inadequate,  
17 plaintiff has presented no evidence to counter the record of care Dr. Schommer provided or  
18 the appropriateness of her medical decisions. Rather, the only evidence as to the propriety of  
19 the care given by Dr. Schommer is that provided by Jeffrey Schwartz, M.D., an expert  
20 offered in support of Dr. Schommer's motion for summary judgment. In Dr. Schwartz's  
21 opinion, the care and treatment provided by Dr. Schommer was, in all respects, in conformity  
22 with the requisite standard of care. (See Schwartz Decl. ¶ 13.) Plaintiff's unsupported  
23 allegations that Dr. Schommer failed to properly examine and diagnose him are insufficient  
24 to raise a triable issue on plaintiff's claim that Dr. Schommer knowingly disregarded a  
25 substantial risk of serious harm to plaintiff. Accordingly, summary judgment will be granted  
26 in favor of Dr. Schommer on plaintiff's Eighth Amendment claim.

### iii. Drs. Gurov and Micheletti

28 Plaintiff claims Drs. Gurov and Micheletti acted with deliberate indifference to his

1 serious medical needs because they failed to properly diagnose him, treat his pain, and  
2 provide him with a blood transfusion prior to his transfer to UCSF.

3 To counter plaintiff's claims, defendants have presented undisputed evidence showing  
4 Dr. Gurov reviewed plaintiff's CT scan and assessed plaintiff as having an upper GI bleed,  
5 ordered that plaintiff be given IV fluids and medications, had plaintiff's blood typed and  
6 screened in case he needed a blood transfusion, retained plaintiff in the hospital after the  
7 EGD to monitor plaintiff for the source of the GI bleed, and consulted with Dr. Schommer  
8 about plaintiff's condition. Additionally, defendants undisputed evidence shows Dr.  
9 Micheletti assessed plaintiff for transfer on the same date he was asked to do so, prescribed  
10 pain medication for plaintiff, and determined, based on plaintiff's lab results, that plaintiff  
11 did not require a blood transfusion prior to being transferred.

12 Defendants have submitted expert evidence that all of the care and treatment provided  
13 by Drs. Gurov and Micheletti was well within the requisite standard of care. (See Miller  
14 Decl. ¶ 34.) In opposition to defendants' evidence, plaintiff has presented only his  
15 declaration asserting the care he received was inadequate. Plaintiff's conclusory assertions  
16 are insufficient to raise a triable issue as to plaintiff's claim that defendants knowingly  
17 disregarded a substantial risk of serious harm to him. Accordingly, summary judgment will  
18 be granted in favor of Drs. Gurov and Micheletti on plaintiff's Eighth Amendment claims.

19       8.     Conclusion

20       In sum, for the reasons stated above, the Court finds plaintiff has failed to present  
21 evidence sufficient to raise a triable issue, with respect to any of the above-named  
22 defendants, on his claim that such defendants acted with deliberate indifference to his serious  
23 medical needs in violation of the Eighth Amendment. Accordingly, summary judgment will  
24 be granted in favor of all defendants against whom plaintiff has asserted such claims.

25       III.    Excessive Force: defendants Mills, Quam, Timme and Nelson

26       Plaintiff claims PBSP Correctional Officers R. Mills ("Officer Mills") and D. Quam  
27 ("Officer Quam") used unwarranted force against him in violation of the Eighth Amendment,  
28 when escorting him from the prison medical clinic on May 22. He further claims Nurse

1 Timme and Medical Technical Assistant (“MTA”) Nelson unlawfully failed to intervene to  
2 stop the use of force.

3 Whenever prison officials stand accused of using excessive force in violation of the  
4 Eighth Amendment, the “core judicial inquiry” is “whether force was applied in a good-faith  
5 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.”  
6 Hudson v. McMillian, 503 U.S. 1, 6-7 (1992). In determining whether the use of force was  
7 for the purpose of maintaining or restoring discipline, or for the malicious and sadistic  
8 purpose of causing harm, courts evaluate such factors as the need for application of force, the  
9 relationship between that need and the amount of force used, the extent of any injury  
10 inflicted, the threat reasonably perceived by the responsible officials, and any efforts made to  
11 temper the severity of a forceful response. Id. at 7. A prisoner need not demonstrate,  
12 however, that he suffered serious injury in order to establish an Eighth Amendment violation  
13 based on use of excessive force. See id. (holding “absence of serious injury is [ ] relevant to  
14 the Eighth Amendment inquiry, but does not end it”); see also Wilkins v. Gaddy, 130 S.Ct.  
15 1175, 1178, 1180 (2010) (noting Supreme Court has “rejected the notion that ‘significant  
16 injury’ is a threshold requirement for stating an excessive force claim”; reversing dismissal  
17 where district court’s determination based solely on finding of “de minimis” injury) (citing  
18 Hudson).

19 Although liability under § 1983 does not attach to “a mere bystander” who had “no  
20 role in the unlawful conduct,” Boyd v. Benton County, 374 F.3d 773, 780 (9th Cir. 2004),  
21 “[a] prison official can violate a prisoner’s Eighth Amendment rights by failing to  
22 intervene,” provided such official had an opportunity to intervene. See Robins v. Meecham,  
23 60 F.3d 1436, 1442 (9th Cir. 1995) (affirming denial of summary judgment in favor of  
24 correctional officers where evidence showed officers, at time of alleged improper shooting,  
25 were in same control bubble as officer who fired shotgun but took no action to prevent such  
26 officer from firing, and officers offered no evidence they lacked opportunity to intervene);  
27 see also Cunningham v. Gates, 229 F.3d 1271, 1289 (9th Cir. 2000) (holding on Fourth  
28 Amendment claim of excessive force, “officers can be held liable for failing to intercede only

1 if they had an opportunity to intercede").

2       A. Background

3           1. Plaintiff's Facts

4       In support of his claim, plaintiff presents the following evidence:

5       On the afternoon of May 22, plaintiff was escorted to the medical clinic by  
6 Correctional Officers Quam and Mills. (FAC ¶ 73.) While plaintiff was explaining his  
7 medical problem to Nurse Timme, defendant MTA Nelson walked into the office and said an  
8 alarm had gone off and they needed to attend to a medical emergency. (Id. ¶ 75.) Nurse  
9 Timme and MTA Nelson told plaintiff he would be alright, and that they needed to leave.  
10 (Id.) Plaintiff requested to see a doctor, but Nurse Timme and MTA Nelson informed  
11 plaintiff that plaintiff had to leave as well. (Id. ¶ 76.)

12       Officer Mills asked plaintiff to get up, and grabbed plaintiff's arm tightly, explaining  
13 they needed to attend to a medical emergency. Plaintiff questioned why he had to leave,  
14 explaining he too was experiencing a medical emergency. (Id. ¶¶ 78-82.) Officer Mills then  
15 grabbed plaintiff's arm tighter and told Officer Quam to grab plaintiff. (Id. ¶ 83.) At that  
16 point, both Officers Mills and Quam "physically and harshly yanked [plaintiff] from the chair  
17 and threw [him] to the ground." (Id. ¶ 84.) While on the ground, plaintiff "felt punches" to  
18 his back, and he was dragged almost all the way to the door. (Id.) When plaintiff finally was  
19 able to gain some strength, he walked voluntarily to his cell. (Id. ¶ 88.)

20       Both Nurse Timme and MTA Nelson witnessed the assault, but neither of them  
21 attempted to intervene to stop Officers Mills and Quam from beating and dragging him. (Id.  
22 ¶ 87.)

23           2. Defendants' Facts

24            a. Officers Mills and Quam

25       According to Officer Mills, the events occurred as follows:

26       Officer Mills had escorted plaintiff to the medical clinic for a medical evaluation on  
27 May 22. (Decl. R. Mills in Supp. PBSP Defs. Mot. Summ. J. ("Mills Decl." ¶ 6.) At the  
28 clinic, Nurse Timme completed the examination and released plaintiff to return to his cell.

1 (Id.) Plaintiff began to argue with Nurse Timme. (Id.) During the argument, an alarm was  
2 activated, signaling a medical emergency in another area of the prison. (Id.)

3 Despite being told that Nurse Timme was required to respond to the emergency,  
4 plaintiff continued to argue with Nurse Timme. (Id.) Officer Mills ordered plaintiff to stand  
5 up so he could be escorted to his cell. (Id.) Plaintiff refused to comply with the order. (Id.)  
6 Officer Mills commenced a hands-on escort by placing one hand on plaintiff and repeating  
7 the order to stand up. (Id.) Plaintiff stood and Officer Mills began his hands-on escort to  
8 plaintiff's cell. (Id.) Before leaving the clinic, however, plaintiff made his body limp, sunk  
9 to the floor, and rested on his knees. (Id.) Officer Mills ordered plaintiff to stand, but  
10 plaintiff refused to comply with the order. (Id.) Officer Mills, with his hand on plaintiff's  
11 arm, repeated the order and made a forward motion toward the door. (Id.) Plaintiff slid a  
12 very short distance toward the door while on his knees. (Id.) Plaintiff refused to comply  
13 with Officer Mills' order to stand and walk, at which time Officer Quam placed his hand on  
14 plaintiff's other arm and plaintiff was raised to his feet. (Id.) Once plaintiff was on his feet,  
15 he walked to his cell without further incident. (Id.)

16 b. Nurse Timme

17 Nurse Timme provides the following account:

18 On May 22, plaintiff came to the medical clinic requesting an EKG. (Timme Decl. ¶  
19 4.) Immediately after Nurse Timme told plaintiff he did not need an EKG, a personal alarm  
20 was activated in another area of the prison. Once the alarm is activated, Nurse Timme is  
21 required to respond to the emergency and must be prepared to administer medical attention to  
22 the person in need of emergent medical attention. (Id. ¶ 5.)

23 Nurse Timme told plaintiff that he was obligated to respond to the emergency and that  
24 the officers would escort plaintiff to his cell. Plaintiff refused to leave. (Id.) Nurse Timme  
25 prepared to respond to the emergency alarm; as he was leaving the clinic, Nurse Timme saw  
26 plaintiff go to his knees and refuse to leave the clinic. (Id.) Officer Mills held plaintiff by  
27 one arm and Officer Quam held plaintiff by the other arm. (Id.) It appeared to Nurse Timme  
28 that they were attempting to protect plaintiff from falling on the floor and possibly injuring

1 himself. (Id.) At no time on May 22 did Nurse Timme observe either Officer Mills or  
2 Officer Quam mistreat plaintiff. (Id. ¶ 7.)<sup>3</sup>

3       B.     Analysis

4       Officers Mills and Quam contend plaintiff has failed to present evidence showing they  
5       acted with sadistic and malicious intent in their use of minimal force to compel plaintiff to  
6       stand and leave the medical clinic when he refused to do so after the sounding of an alarm  
7       announcing a medical emergency in another area of the prison. Rather, they maintain, their  
8       use of force was reasonable under the circumstances.

9       Plaintiff has presented evidence, however, that said defendants not only grabbed him  
10      by the arm in order to get him to stand, as conceded by defendants, but that they also yanked  
11      him from his chair, threw him to the ground, and punched him more than once in the back.  
12      Given such evidence, which the Court must at this stage of the proceedings view in the light  
13      most favorable to plaintiff, the Court finds plaintiff has raised a triable issue of fact with  
14      respect to his claim that Officers Mills and Quam used force maliciously and sadistically to  
15      cause harm, rather than to maintain order and security when escorting plaintiff from the  
16      medical clinic back to his cell. Consequently, Officers Mills and Quam are not entitled to  
17      summary judgment on plaintiff's excessive force claim.

18       Nurse Timme argues he did not fail to intervene in the use of excessive force by  
19      Officers Mills and Quam because he never had the opportunity to intervene. Specifically,  
20      Nurse Timme attests he did not see Officers Mills and Quam engage in any act that could be  
21      interpreted as the use of excessive force and, further, that he was responding to a medical  
22      emergency at the time and thus was required to leave immediately.

23       In contradiction of Nurse Timme's evidence that he did not see Officers Mills and  
24      Quam use excessive force, plaintiff, as noted, has presented evidence that Nurse Timme did  
25      observe said officers beating him and using force in excess of that required to escort him to  
26      his cell. Plaintiff, however, has not presented evidence that calls into dispute Nurse Timme's

---

27  
28       <sup>3</sup> MTA Nelson, who has not been served or made an appearance herein, has not  
     submitted a declaration or other evidence.

1 evidence that at the time of such alleged use of excessive force Nurse Timme was responding  
2 to a medical emergency and, consequently, was unable to stay. Indeed, plaintiff himself  
3 confirms that he was told by Nurse Timme that Nurse Timme was required to respond to  
4 such emergency. Moreover, there is no evidence suggesting Nurse Timme is a law  
5 enforcement officer or that Nurse Timme was engaged in any joint action for law  
6 enforcement purposes, or that Nurse Timme was otherwise obligated to take action to  
7 intervene in or control the conduct of correctional officers. See Boyd, 374 F.3d at 780  
8 (holding bystander having no role in unlawful conduct has no duty to intervene).

9 Accordingly, with respect to plaintiff's excessive force claim, summary judgment will  
10 be granted in favor of Nurse Timme and denied with respect to Officer's Mills and Quam.

11 **IV. Supplemental State Law Claims**

12 In addition to the above-discussed federal constitutional claims, plaintiff brings  
13 supplemental state law claims for medical malpractice (Seventh and Fourteenth Causes of  
14 Action), failure to furnish medical care in violation of California Government Code § 845.6  
15 (Eighth and Eleventh Causes of Action), negligence (Ninth and Tenth Causes of Action),  
16 battery (Twelfth Cause of Action), failure to intervene in the use of force in violation of  
17 California Government Code § 844.6 (Thirteenth Cause of Action).

18 A federal court has supplemental jurisdiction over claims "that are so related to claims  
19 in the action within [the district court's] original jurisdiction that they form part of the same  
20 case or controversy under Article III." 28 U.S.C. § 1337(a). A district court, however, may  
21 decline to exercise supplemental jurisdiction over a claim if (1) the claim raises novel or  
22 complex state law issues; (2) the claim "substantially predominates" over the court's  
23 original-jurisdiction claims; (3) the court has dismissed all of the original-jurisdiction claims;  
24 or (4) in "exceptional circumstances" if there are "other compelling reasons" to decline. 28  
25 U.S.C. § 1337(c). In particular, "[n]eedless decisions of state law should be avoided both as  
26 a matter of comity and to promote justice between the parties, by procuring them a  
27 surer-footed reading of applicable law." United Mine Workers of America v. Gibbs, 383  
28 U.S. 715, 726 (1966).

1       Here, summary judgment has been granted on all of plaintiff's Eighth Amendment  
2 claims for deliberate indifference to his serious medical needs. As noted, however, plaintiff  
3 also asserts six state law claims for relief concerning inadequate medical care. As plaintiff's  
4 only remaining claims for federal relief are the excessive force claims brought against  
5 Officers Mills and Quam, the Court concludes plaintiff's state law medical claims  
6 substantially predominate over the claims as to which the Court has original jurisdiction. In  
7 particular, plaintiff's state law medical claims are brought against fifteen defendants and  
8 require elements of proof that are distinct from both the federal excessive force claim and  
9 plaintiff's related battery claim under state law. Consequently, the Court will decline to  
10 assert supplemental jurisdiction over the state law claims pleaded in plaintiff's Seventh,  
11 Eighth, Ninth, Tenth, Eleventh and Fourteenth Causes of Action. See Patel v. Penman, 103  
12 F.3d 868, 877 (9th Cir. 1996) (affirming district court's declination of supplemental  
13 jurisdiction under § 1367(c)(2) where state law inverse condemnation claim substantially  
14 predominated over remaining claim under § 1983); Martin v. Dahlberg, 156 F.R.D. 207, 218  
15 (N.D. Cal. 1994) (declining, pursuant to § 1367(c)(2), supplemental jurisdiction where state  
16 law claims brought under consumer protection laws substantially predominated over  
17 remaining RICO claims); James v. Sun Glass Hut of California, 799 F. Supp. 1083, 1084 (D.  
18 Colo. 1992) (declining supplemental jurisdiction under § 1367(c)(2) where plaintiff's state  
19 law contract and fraud claims substantially predominated over federal ADEA claim).

20       Accordingly, the state law claims asserted in the above-referenced six causes of action  
21 will be dismissed without prejudice to plaintiff's refiling those claims in state court in  
22 accordance with the statutory tolling provision set forth at 28 U.S.C. § 1367(d). See id.  
23 ("The period of limitations for any claim asserted under subsection (a), and for any other  
24 claim in the same action that is voluntarily dismissed at the same time as or after the  
25 dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for  
26 a period of 30 days after it is dismissed unless State law provides for a longer tolling  
27 period.").

28       V.     Unserved Defendants

1        In its May 22, 2009 order directing service of the FAC, the Court directed the United  
2 States Marshal (“Marshal”) to serve MTA Nelson and Medhane Yordanos, L.V.N. (“Nurse  
3 Yordanos”), two newly-named defendants who had not been served with the original  
4 complaint. On August 28, 2009, the unexecuted summons for MTA Nelson was returned to  
5 the court with a notation by the Marshal that the summons had been returned to the Marshal  
6 by the PBSP Litigation Coordinator for the reason that more information was needed to  
7 locate the named individual. (Docket No. 52.) Additionally, on September 25, 2009, the  
8 unexecuted summons for Nurse Yordanos was returned to the court with a notation by the  
9 Marshal that the summons had been returned to the Marshal by the PBSP Litigation  
10 Coordinator for the reason that such individual, a contract employee at PBSP, had retired and  
11 was no longer at PBSP. (Docket No. 76.)

12        To date, neither such defendant has been served. It is clear, however, that the claims  
13 against them are subject to dismissal. Specifically, plaintiff alleges MTA Nelson, together  
14 with Nurse Timme, failed, on May 22, 2007, to respond adequately to plaintiff’s request for  
15 medical care and to intervene when Officers Mills and Quam used force against plaintiff.  
16 (See supra, sections II(A)(5) & III.) There is no suggestion, however, either in the FAC and  
17 exhibits attached thereto or in the briefs and exhibits filed in connection with the PBSP  
18 defendants’ instant motion for summary judgment, that the Court’s analysis of the claims  
19 made with respect to plaintiff’s claims against MTA Nelson would differ in any respect from  
20 the analysis of such claims as alleged against Nurse Timme. Given the Court’s finding that  
21 plaintiff has failed to produce evidence sufficient to raise a triable issue as to plaintiff’s  
22 claims that Nurse Timme acted with deliberate indifference to plaintiff’s serious medical  
23 needs and failed to intervene in the use of excessive force, plaintiff cannot prevail on those  
24 same claims as against MTA Nelson. Accordingly, the Court will grant summary judgment  
25 in favor of MTA Nelson. See Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery, 44  
26 F.3d 800, 803 (9th Cir. 1995) (affirming grant of summary judgment in favor of  
27 nonappearing defendant where plaintiff, in response to summary judgment motion filed by  
28 appearing defendant, had “full and fair opportunity to brief and present evidence” on

1 dispositive issue as to claim against nonappearing defendant).

2 With respect to Nurse Yordanos, plaintiff asserts that when Nurse Yordanos was  
3 called to plaintiff's cell on May 21 in response to plaintiff's complaints of pain, the following  
4 occurred: (1) Nurse Yordanos asked plaintiff to describe his pain (FAC ¶ 55); (2) as plaintiff  
5 was losing consciousness, he heard another inmate ask Nurse Yordanos to press the alarm  
6 button, which, in plaintiff's opinion, would have enabled responding officers "to arrive fast,"  
7 but Nurse Yordanos did not do so (*Id.* ¶ 56); (3) plaintiff thereafter woke up, was placed on a  
8 stretcher, and transported to the Correctional Treatment Center ("CTC"); while en route to  
9 the CTC, Nurse Yordanos took plaintiff's vital signs (*Id.* ¶¶ 57-60.) Even when the facts  
10 asserted by plaintiff are viewed in the light most favorable to him, plaintiff has failed to  
11 present evidence from which a reasonable trier of fact could conclude Nurse Yordanos acted  
12 with deliberate indifference to plaintiff's serious medical needs. In particular, plaintiff has  
13 not shown he was sufficiently conscious to know whether the alarm was used. Moreover,  
14 transportation was provided and there is no evidence of any delay in that regard.  
15 Consequently, even if Nurse Yordanos did not push the alarm button, there is no evidence to  
16 suggest Nurse Yordanos knowingly disregarded a substantial risk of serious harm to plaintiff.  
17 Accordingly, as there is no suggestion in the FAC and exhibits attached thereto, or in the  
18 briefs and exhibits filed in connection with the PBSP defendants' instant motion for summary  
19 judgment, that Nurse Yordanos acted other than in a medically appropriate manner or that  
20 plaintiff suffered any injury as a result of Nurse Yordanos' actions, summary judgment will  
21 be granted in favor of Nurse Yordanos.

## 22 CONCLUSION

23 For the foregoing reasons, the Court orders as follows:

24 1. Summary judgment is hereby GRANTED in favor of the following defendants on  
25 plaintiff's claims of deliberate indifference to plaintiff's serious medical needs: Dr. Sogge,  
26 Nurse Waddell, Correctional Officer Cox, Nurse Carr, Nurse Bree, Nurse Timme, Dr. Rowe,  
27 Dr. Williams, Physician's Assistant Gina Gastelum, Dr. Saunders, Dr. Nash, Dr. Schommer,  
28 Dr. Gurov, Dr. Micheletti and Nurse Yordanos.

## United States District Court

For the Northern District of California

1       2. Plaintiff's supplemental state law claims alleging inadequate medical care are  
2 hereby DISMISSED without prejudice to plaintiff's raising those claims in state court.

3       3. Summary judgment is hereby GRANTED in favor of Nurse Timme and MTA  
4 Nelson on plaintiff's claims of excessive force.

5       4. Summary judgment is hereby DENIED with respect plaintiff's claims of excessive  
6 force as alleged against Officers Mills and Quam.

7       5. The instant matter is hereby REFERRED to Magistrate Judge Nandor Vadas for  
8 settlement proceedings on plaintiff's remaining excessive force claims. The proceedings  
9 shall take place within 120 days of the date this order is filed, or as soon thereafter as  
10 Magistrate Judge Vadas' calendar will permit. Magistrate Judge Vadas shall coordinate a  
11 place, time and date for one or more settlement conferences with all interested parties and/or  
12 their representatives and, within fifteen days of the conclusion of all settlement proceedings,  
13 shall file with the Court a report thereon.

14       The Clerk is directed to serve Magistrate Judge Vadas with a copy of this order and to  
15 notify Magistrate Judge Vadas that a copy of the court file can be retrieved from the court's  
16 electronic filing database (ECF).

17       This order terminates Docket Nos. 60, 81, 112, 116 and 121.

18       IT IS SO ORDERED.

19       DATED: September 30, 2010

20         
21       MAXINE M. CHESNEY  
22       United States District Judge

23

24

25

26

27

28